LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court,
FILED
MAR 5 1969
JOHN F. DAVIS, CLERK

# APPENDIX

# Supreme Court of the United States

OCTOBER TERM, 1968

**No. 830**

CAPTAIN DALE E. NOYD,

*Petitioner,*

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1968

CERTIORARI GRANTED JANUARY 20, 1969

# INDEX


| | PAGE |
|---|---|
| Docket Entries | 1 |
| Petition for Writ of Habeas Corpus | 3 |
| Decision and Order of the District Court | 16 |
| Opinion of the United States Court of Appeals | 22 |
| Order Granting Release | 27 |
| Order Granting Writ of Certiorari | 29 |
| General Court-Martial Order No. 13 | 30 |
| Letter Regarding Arrest in Quarters | 32 |
| Opinion of the Air Force Board of Review | 35 |
| Opinion of the District Court, District of Colorado, Dated March 29, 1967 | 48 |

## Docket Entries

*1968*

May 16 Filing Petition for Writ of Habeas Corpus. JS 5

May 16 Filing and entering Order to Show Cause, that respondents show cause why a writ of habeas corpus should not issue, on May 23, 1968 at 10:00 a. m.; that petitioner be continued in his present custody; that petition be brought to Albuquerque at the above date; that service of this order together with a copy of the verified petition and exhibits, on the U. S. Attorney, on respondent Colonel George R. Doerr, on or before May 20, 1968; that service be made upon the Attorney General of the United States forthwith. (Payne).

May 23 At Albuquerque, Judge Payne in open court, Sid Morrish, acting reporter. Called at 10:00 AM for Hearing on Order to Show Cause. APPEARANCES: Mr. Karpatkin, Mr. Phillips & Mr. Kitts for Petitioner who was present in court. Mr. Quinn, Miss Streeter and Lt. Col. Barrett (admitted on motion of Mr. Quinn for this hearing) for Respondent. Arguments had to the Court. Court announces its ruling as will appear in reporters record. Order to be entered by the court ruling this court has Jurisdiction and Staying the Execution of sentence imposed imposed by the Military. The Court will issue written Finding of Fact and Conclusions of Law. At request of Mr. Karpatkin, the court orders from the bench, pending written order that execution be stayed pending appeal.

May 23 Filing Notice of Appeal by petitioner. Copy delivered to U. S. Attorney.

May 24 Filing and entering Decision and Order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void, and the Court has no jurisdiction or authority to interfere with the discretion of the military establishment concerning petitioner's custody, so long as such discretion is exercised within the framework of the Uniform Code of Military Justice, and relieving petitioner from the order requiring him to go to the disciplinary barracks at Fort Leavenworth, Kansas. (Payne)

May 27 Filing Bond on Appeal secured by cash deposit.

May 27 Filing Notice of Appeal.

## Petition for Writ of Habeas Corpus

[Filed May 16, 1968]

UNITED STATES DISTRICT COURT

District of New Mexico

Civil Action No. 7560

---

Captain Dale E. Noyd,

*Petitioner,*

—v.—

Major General Charles R. Bond, Jr., Commander, Twelfth Air Force, United States Air Force; Colonel George R. Doerr, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; Colonel Robert R. Scott, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; Colonel Jimmy J. Jumper, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; Lieutenant Colonel James L. Glessner, Jr., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; Captain Charles Thompson, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

*Respondents.*

---

*To The Honorable United States District Court for the District of New Mexico:*

The petition of Captain Dale E. Noyd respectfully shows:

1. Petitioner makes application herein for a writ of habeas corpus in that he is unlawfully detained and re-

strained of his liberty by and under the authority of the respondents at Cannon Air Force Base, Clovis, New Mexico, in this District.

2. Petitioner is a regular commissioned officer in the United States Air Force, assigned to the 524th Tactical Fighter Squadron, which is part of the 27th Tactical Fighter Wing, which in turn is part of the 832nd Air Division, all of which are stationed at Cannon Air Force Base, New Mexico.

3. Petitioner has been in confinement at Cannon Air Force Base, New Mexico since March 9, 1968. The place of his confinement is his quarters, at No. 1651a, Cannon Air Force Base, Clovis, New Mexico. Petitioner has been so confined since such date, in the status of arrest in quarters.

4. The cause of such confinement and detention is a judgment of conviction rendered on March 8, 1968 by a general court martial for violation of Article 90 of the Uniform Code of Military Justice. Article 90 deals with willful violations of a lawful order. The charge and specification are as follows:

"CHARGE: Violation of the Uniform Code of Military Justice, Article 90.

"SPECIFICATION: In that CAPTAIN DALE E. NOYD, United States Air Force, 524th Tactical Fighter Squadron, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, having received a lawful command from Colonel Homer K. Hansen, his superior officer, 'To perform duties as instructor pilot tomorrow, 5 December

1967, as scheduled,' did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same."

On March 9, 1968, said general court martial sentenced petitioner to dismissal from the service, forfeiture of all pay and allowances, and one year of confinement at hard labor.

5. The respondents are as follows:

(a) The respondent, General Bond, is the Commander of the 12th Air Force who ordered that a general court martial be convened for the purpose of trying petitioner for an act of alleged willful disobedience of a lawful order. Such respondent, on May 10, 1968, approved of the findings and sentence of such general court martial and has directed that petitioner be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas. On information and belief, such transfer is to be effected on May 20, 1968, unless there is a contrary order by this Court.

(b) The respondent, Colonel Doerr, in his capacity as Base Commander at Cannon Air Force Base, ordered that petitioner be confined in arrest in quarters following his sentence on March 9, 1968. Pursuant to such confinement order, petitioner is compelled to remain in his quarters at all times, and may not leave for any reason except with the permission of such respondent, or in the event of emergency.

(c) The respondents, Colonel Scott, Colonel Jumper and Lieutenant Colonel Glessner are, respectively, petitioner's Division Commander, Wing Commander and Squadron Commander.

(d) The respondent, Captain Thompson, as Commander of the Security Police at Cannon Air Force Base, is the officer in charge of supervising the detention and arrest of petitioner. On information and belief, such respondent, and his predecessor, have, pursuant to orders issued by the respondent Colonel Doerr, caused continued surveillance to be instituted and maintained over petitioner's detention, including, without limitation, inspection visits two times each day by Security Police personnel.

6. The events which resulted in petitioner's court martial, conviction and imprisonment are set forth in a petition for a writ of certiorari which petitioner filed in the United States Supreme Court in the case of *Noyd* v. *McNamara, et al.*, Oct. Term 1967, No. 722 (Exhibit "A" hereto), and particularly in the "Statement of the Case" on pages 7-20 thereof. These events commenced with petitioner's making application for recognition as a conscientious objector late in the fall of 1966, pursuant to appropriate statutes and Air Force Regulation 35-24. At such time petitioner, who had eleven years of honorable service, including a tour of duty as a fighter pilot in England, was assigned as Assistant Professor of Psychology at the United States Air Force Academy, Colorado Springs, Colorado. Such application was denied by the Air Force on grounds which petitioner claims were unlawful and unconstitutional, because his religious beliefs were not those of universal pacifism, and in a manner which violated the procedure dictated by the regulations, and was otherwise in violation of petitioner's constitutional rights. (See Exhibit "A", p. 3, "Statement of Questions Presented", and pp. 20-42, *passim*.)

7. Following such denial, petitioner was ordered transferred from the United States Air Force Academy to Cannon Air Force Base. Prior to such transfer, on March 27, 1967, petitioner instituted an action in the United States District Court for the District of Colorado for the purpose of seeking judicial relief from a combat or combat-related assignment, which would be in violation of his conscience. On March 29, 1967 Hon. William E. Doyle, United States District Judge, granted a preliminary injunction

> "against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a general court martial or other proceedings which might injure him as a practical matter."
>
> *Noyd* v. *McNamara,* —— F. Supp. —— (Exhibit "A", pp. 1a-3a).

After a full trial, Judge Doyle ruled that the Federal Court did not have jurisdiction because of the failure to exhaust military remedies, and consequently, dismissed the complaint and dissolved the injunction. Judge Doyle wrote:

> "We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or review his particular basis for claiming that he is a conscientious objector."
>
> 267 F. Supp. 708 (Exhibit "A", p. 18a).

8. The decision of the District Court was appealed to the United States Court of Appeals for the Tenth Circuit. Such court affirmed the dismissal on grounds of lack of jurisdiction. The Tenth Circuit pointed out that it could

not anticipate that petitioner will be denied "a full consideration of his constitutional rights within the complete scope of that [military] process." 378 F. 2d 538 (Exhibit "A", p. 21a).

9. A petition for certiorari (Exhibit "A" hereto) was filed in the United States Supreme Court and denied on December 18, 1967, Mr. Justice Douglas dissenting. In the Solicitor General's memorandum for the United States in opposition to the petition for certiorari, it was urged that the civilian courts should not intervene, since petitioner would have a full opportunity to present his constitutional defenses within the military process. The Solicitor General wrote:

> "if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have an opportunity to present his defenses within the traditional framework of court martial procedures, review boards, resort to the service Secretary, and request for relief from the Court of Military Appeals. If his contentions fail, and if they relate to fundamental rights, it would then be appropriate to test them in the civil courts by a petition for habeas corpus."
>
> *Noyd* v. *McNamara,* Sup. Ct. of U.S., Oct. Term 1967, No. 722, Solicitor General's Memorandum in Opposition, p. 4.

The Solicitor General added that all of petitioner's constitutional issues "can be readily decided in a single court martial proceeding" (Memorandum, p. 7).

10. Thus, petitioner proceeded through all of the civilian court channels available in an attempt to secure relief in

some less drastic fashion than by disobeying an order and facing a court martial. At each stage, however, petitioner's contentions were greeted with jurisdictional objections accompanied by repeated assurances that he would be able to raise all of his constitutional defenses in a court martial, including, specifically, the defense of wrongful denial of his application for classification as a conscientious objector.

11. On December 5, 1967, the inevitable confrontation occurred, as a result of which petitioner was charged with the violation of Article 90, which led to his court martial, his conviction, and his present incarceration.

12. Notwithstanding these assurances, at the ensuing court martial, petitioner's attempts to raise these defenses were frustrated. As is set forth in assignments No. 13 through No. 17 in the Assignments of Error attached hereto (Exhibit "B"), and as can be seen from a review of the trial record which will be available for perusal by this Court, all of petitioner's efforts to raise these constitutional defenses were rejected by the Law Officer, and were never considered by the court.

13. The principal legal question which petitioner has thus far not had a hearing on in any forum—save for the initial decision by Judge Doyle granting a preliminary injunction—is whether or not he is disqualified from classification as a conscientious objector because his religious views are not those of universal pacifism. It is clear that the Secretary of the Air Force and other senior Air Force officers who rendered the final decision on petitioner's application denied his application on the grounds that he failed to qualify because he was not a universal pacifist.

This was readily admitted by the Solicitor General in the Supreme Court of the United States:

> "The Air Force's denial of petitioner's claim to conscientious objector status was based on his own statements regarding the types of war to which he objects, and there is no indication that the Air Force relied on any other evidence."
>
> Memorandum in Opposition, p. 10.

14. By reason of the foregoing, petitioner has thus far been denied his day in court on this vital constitutional question, affecting his constitutional right of religious liberty, and likewise his personal freedom. There has not yet been any judicial review of whether or not the Secretary had the legal authority to deny petitioner's claim for this reason. Obviously, if the Secretary denied the claim for an unlawful reason, any subsequent order petitioner received could not be a lawful order. This was the argument which petitioner attempted to advance in the court martial, but the Law Officer refused to consider the argument that wrongful denial of conscientious objector status was a defense to a prosecution for disobedience.

15. In addition to the foregoing, there were numerous additional errors of law committed in the course of the court martial, any one or more of which may well result in reversal on appeal. See Exhibit "B", *passim*.

16. The normal appellate procedures provided following a conviction by general court martial include appeal to a Board of Review within the Air Force; petition for certiorari to the United States Court of Military Appeals; and if certiorari is granted, review on the merits by the

Court of Military Appeals. Petitioner has been advised by counsel, including assigned appellate defense counsel from the Office of the Judge Advocate General of the Air Force, that this appellate process is not likely to be completed by the end of 1968, if indeed it can be completed by then.

17. Petitioner's one-year sentence began to be served on March 9, 1968. Petitioner is informed that with time off for good behavior it is possible that his imposed sentence of one year could be fully served in fact within ten months or less. Under the circumstances, petitioner's continued detention may well result in an appellate reversal after he has served out most, if not all, of his sentence.

18. Petitioner's continued confinement is therefore unlawful and unconstitutional and may well cause irreparable injury if his conviction is reversed on appeal because of one or more errors of law.

19. *A fortiori,* the execution of his anticipated transfer to the United States Disciplinary Barracks at Fort Leavenworth, which is, on information and belief, the ultimate in high security penal institutions, to which the most severe military criminal convicts are sent, will magnify immeasurably such irreparable injury.

20. On the other hand, petitioner's release from confinement, or, in the alternative, the maintenance of present conditions of confinement until the completion of appellate review will endanger neither person nor property nor any lawful interest of the United States Air Force.

21. On April 22, 1968, petitioner's counsel appeared before Colonel Thomas W. Isbell, Staff Judge Advocate and

legal advisor to the respondent General Bond, and certain members of Colonel Isbell's staff. At such occasion, Assignments of Error in Behalf of the Accused, a copy of which is attached hereto (Exhibit "B") were presented. Likewise at such occasion, an application was made to the convening authority, the respondent General Bond, for either release on bail or continuation of the present conditions of confinement, pending completion of appellate review. By the action of the convening authority in approving the findings and sentence and in ordering the transfer of petitioner to Fort Leavenworth, such request has been denied.

22. Petitioner is informed, and believes, on the basis of inquiries made and information obtained by counsel, that any similar requests made to higher military authorities, including to the Office of the Secretary of the Air Force, will be referred to the respondent General Bond. Consequently, since the respondent General Bond has previously denied such request, petitioner has, on information and belief, exhausted all effective military remedies.

23. Petitioner's continued confinement is illegal and unconstitutional for the following reasons:

(a) Because of the many grave errors of law made prior to and in the course of the general court martial, including specifically, the erroneous refusal to allow petitioner to attempt to prove the illegality of the order, by demonstrating that his claim for conscientious objector classification was improperly denied, such conviction bears a strong likelihood of reversal either in the military appellate courts, or, if necessary, in subsequent proceedings in the Federal Courts.

Consequently, incarceration pending appeal is arbitrary, capricious and without due process of law.

(b) Without limitation of the foregoing, petitioner, who was in effect directed by the Federal Courts and advised by the Solicitor General of the United States to raise his defenses in a military tribunal, was denied the right by the military tribunal to raise such defenses. Keeping him in confinement until some authoritative military or civil tribunal considers and adjudicates the merits is uniquely cruel, frustrating, unjust and a deprivation of liberty without due process of law.

(c) It is in violation of paragraph 21(d) of the Manual for Courts Martial, which provides for the restraint of a person tried and convicted by court martial and allows "the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case." No restraint is necessary in this case.

(d) It is in violation of the due process clause of the Fifth Amendment, and the excessive bail provision of the Eighth Amendment, as well as the religious liberty clause of the First Amendment, for the petitioner to continue to be confined under these circumstances.

23. No prior application has been made for the relief sought herein.

WHEREFORE, petitioner prays for the following relief:

(i) that a writ of habeas corpus issue herein, directed to the respondents, commanding them to produce the body of the petitioner, Captain Dale E. Noyd, before this Court at a time and place to be specified in such writ, to the end that

this Court may inquire into the cause of petitioner's detention, and commanding respondents not to transfer the petitioner to any other place or condition of confinement, pending full hearing and determination of this application and any appeals therefrom;

(ii) that after a full and complete hearing, this Court issue an order:

(A). that petitioner be ordered discharged from the detention and restraint aforesaid, and reassigned to duties not in conflict with his conscientious beliefs, or, in the alternative,

(B) that petitioner be released on reasonable bail, or parole, or on his own recognizance, and either placed on leave or assigned to duties not in conflict with his conscientious beliefs, pending the completion of appellate review, or, in the alternative,

(C) that this Court order that the petitioner be retained in his present condition of confinement and not be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas, or to any other place, pending the completion of appellate review, and

(iii) for such other and further relief as may be just and proper.

Dated: May 15, 1968.

CAPTAIN DALE E. NOYD, *Petitioner*,

By /s/ MARVIN M. KARPATKIN
MARVIN M. KARPATKIN
660 Madison Avenue
New York, New York 10021

JOHN DEJ. PEMBERTON, JR.
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

PAUL A. PHILLIPS
520 Simms Building
Albuquerque, New Mexico 87101

WILLARD F. KITTS
Bank of New Mexico Building
Albuquerque, New Mexico 87101

*Attorneys for Petitioner*

*Of Counsel*:

RHODA H. KARPATKIN
MELVIN L. WULF
BURT NEUBORNE
ALFRED H. McRAE
Bank of New Mexico Bldg.
Albuquerque, New Mexico

FRANK H. ALLEN, JR.
Public Service Company Bldg.
Albuquerque, New Mexico

[Verified on May 15, 1968]

**Decision and Order of the District Court**

[Filed May 24, 1968]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 7560 Civil

---

CAPTAIN DALE E. NOYD,

*Petitioner,*

v.

MAJOR GENERAL CHARLES R. BOND., JR., Commander, Twelfth Air Force, United States Air Force, *et al.*,

*Respondents.*

---

This cause came on for hearing on the 23rd day of May, 1968, at 10:00 a.m., on an Order to Show Cause issued by this Court on May 16, 1968, requiring the respondents to show cause why a writ of habeas corpus should not issue herein as prayed for in the petition. The petitioner was present in person and by his attorneys. The petitioner was represented by Marvin M. Karpatkin and other attorneys. The respondents were represented by the Honorable John Quinn, United States Attorney, and others. No testimony was taken, but each side argued the case at length. Since no opposing testimony was offered, the Court took the petition to be true, and this opinion is based upon such facts.

It may be noted at the outset that the function of a Federal District Court in a case such as this is not to re-

evaluate the evidence and make a determination of the petitioner's guilt or innocence. The extent to which this Court should inquire into this matter has been defined by the Tenth Circuit as follows:

> "(1) The scope of judicial review of military habeas corpus cases is well established. Court inquiry is limited to whether the court-martial had jurisdiction of the person and the offense charged, whether the accused was accorded due process of law as contemplated and assured by the Uniform Code of Military Justice, and whether competent military tribunals gave fair and full consideration to all the procedural safeguards deemed essential to a fair trial under military law."

*Gorko* v. *Commanding Officer,* 314 F. 2d 858 (1963). In *Kennedy* v. *Commandant,* 377 F. 2d 339, the same court, speaking through Chief Judge Murrah, reiterated the above expressed formula.

The facts presented by this case are as follows: Petitioner was convicted by a general court-martial for violation of Article 90 of the Uniform Code of Military Justice for a willful violation of a lawful order. This conviction occurred at Cannon Air Force Base near Clovis, New Mexico, and the judgment of the conviction was rendered on March 8, 1968. The petitioner was sentenced to dismissal from the service, forfeiture of all pay and allowances, and one year of confinement at hard labor, and on May 10, 1968, General Bond approved the findings and sentence of such general court-martial and directed that the petitioner be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

Article 71(c) of the Uniform Code of Military Justice (10 U. S. C. §871(c)) reads as follows:

"(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

There is a disagreement as to whether petitioner's incarceration at Fort Leavenworth would be for the sole purpose of safekeeping, or whether it would be considered execution of his sentence. It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence. Petitioner's sentence includes a term of confinement for one year, and the Court holds that the respondents cannot execute such sentence until such review procedures as are mentioned in Article 71(c) are completed.

Respondents contend that Article 57 of the Uniform Code of Military Justice (10 U. S. C. §857), specifically subsection (b), which provides that "any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial . . .", permits or requires confinement of petitioner in the manner attempted. The Court disagrees with this contention. Article 57 is of a general nature, and it seems to the Court that Article 71 creates specific exceptions to the application of Article 57. Furthermore, if these sections are indeed, to some degree incompatible, the Court believes that any such conflict should be resolved in the petitioner's favor.

The Court has concluded that it has no jurisdiction to tell the respondents what conditions of restraint may be imposed upon the petitioner, or what conditions of release, if any, might be imposed. The Bail Reform Act of 1966 specifically excludes offenses of the type involved here

from the jurisdiction of the district courts. The case of *Levy* v. *Resor, et al.*, 17 U. S. C. M. A. 135, 37 C. M. R. 99, holds that the right of a person in the military service to bail pending appeal from conviction is not constitutional, but statutory only, and that, in the military, there is no statutory provision for such bail. This Court agrees with that decision, and concludes that it has no right to say what bail, if any, should be set for the petitioner, nor to state what conditions of release, if any, should be imposed. Those are matters that are properly within the discretion of the military authority, and it may be that the appropriate officials will feel that the petitioner should be confined during the review procedures. This Court is not attempting to rule on any of those questions. The Court merely holds that sending the petitioner to Fort Leavenworth would, in effect, amount to execution of the sentence.

It has traditionally been held that a writ of habeas corpus is unavailable to question a sentence to be served in the future. In *Rowe* v. *Peyton*, 383 F. 2d 709 (4th Cir., 1967), however, the Fourth Circuit observed that since *McNally* v. *Hill*, 293 U. S. 131, the Supreme Court has adopted a more liberal, less technical concept of the writ, and the Court concluded that a writ might be granted concerning a sentence to be served in the future.

The Fourth Circuit in *Rowe* felt that the Federal habeas corpus writ was available "to serve the clearly present need of a procedural device to test the legality of these convictions (which involved sentences to be served in the future) . . . ." 383 F. 2d 709, 710.

The petitioner in the present case has not yet been incarcerated at Fort Leavenworth; however, an order has been issued requiring him to go there, and the Court be-

lieves that a present need exists to test the legality of such order.

An important question raised by this proceeding is whether this action is premature in view of the fact that the petitioner has not exhausted his military remedies. The Court is familiar with the exhaustion principle, and the wording of the judicial code which codifies this principle, 28 U. S. C. A. §2254. "The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts." *Gusik* v. *Schilder,* 340 U. S. 128, 131, 132.

It is the Court's opinion that the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights. In view of the determination on the part of the Air Force to execute petitioner's sentence before completion of the prerequisites to execution of sentence provided by Article 71(c), U. C. M. J., the Court has concluded that the circumstances warrant a partial granting of the writ requested notwithstanding petitioner's failure at this point to have exhausted his military remedies. 28 U. S. C. A. §2254(b). To require petitioner to await completion of the appellate review process would be to permit execution of his sentence. Such would constitute a deprivation of petitioner's rights under the Uniform Code of Military Justice, Article 71(c).

It is the Court's ruling that (1) the order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void, and (2) the Court has no jurisdiction or authority to interfere with the discretion of the military establishment concerning petitioner's custody, so long as such discretion is exercised within the framework of the Uniform Code of Military Justice.

IT IS, THEREFORE, ORDERED and ADJUDGED that the petitioner be, and he is hereby, relieved from the order requiring him to go to the disciplinary barracks at Fort Leavenworth, Kansas.

Dated this 24th day of May, 1968.

H. VEARLE PAYNE
*United States District Judge*

## Opinion of the United States Court of Appeals

[Filed October 30, 1968]

UNITED STATES COURT OF APPEALS

Tenth Circuit

September, 1968, Term

Number 13-68

---

Captain Dale E. Noyd,

*Appellant,*

—vs.—

Major General Charles R. Bond, Jr., Commander, Twelfth Air Force, United States Air Force; Colonel George R. Doerr, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; Colonel Robert R. Scott, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; Colonel Jimmy J. Jumper, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; Lieutenant Colonel James L. Glessner, Jr., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; Captain Charles Thompson, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

*Appellees.*

Number 14-68

CAPTAIN DALE E. NOYD,

*Cross-Appellee,*

—VS.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

*Cross-Appellants.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(District Court Number 7580)

MARVIN M. KARPATKIN, New York, New York (John DeJ. Pemberton, Burt Neuborne, New York, New York, Paul A. Phillips and F. Willard Kitts, Albuquerque, New Mexico, on the brief), *for Appellant and Cross-Appellee.*

JOHN QUINN, United States Attorney, Albuquerque, New Mexico (John A. Babington, Assistant United States Attorney, Albuquerque, New Mexico, on the brief), *for Appellees and Cross-Appellants.*

Before:

PHILLIPS, HILL and SETH, *United States Circuit Judges.*

---

HILL, *Circuit Judge.*

On March 8, 1968, Dale E. Noyd, a captain in the United States Air Force, was convicted by a general court martial of violating Article 90 of the Uniform Code of Military Justice in that he wilfully disobeyed a lawful military order. He was sentenced to dismissal from the service, forfeiture of all pay and allowances and confinement for one year at hard labor. On May 10, 1968, the general court-martial convening authority General Charles R. Bond, approved the conviction and ordered Noyd removed to the United States Disciplinary Barracks at Fort Leavenworth, Kansas, pending completion of military appellate review. Before the transfer order could be carried out, this petition for habeas corpus was filed in the federal district court of New Mexico. The petition asserted the foregoing facts and sought either release or bail or, in the alternative, maintenance of the pre-existing condition of confinement, namely, arrest in quarters at Cannon Air Force Base, Clovis, New Mexico.

The district court determined that to allow the transfer to Fort Leavenworth would be tantamount to an execution of the sentence prior to the completion of military review procedures. This being prohibited by Article 71(c) of the Uniform Code of Military Justice (UCMJ),[1] it was decreed that appellant be relieved from said order. Pursuant to the court's directive, the Air Force rescinded the transfer

---

[1] Article 71(c) of the Uniform Code of Military Justice provides:

"No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." 10 U. S. C. §871(c).

order and directed that appellant be placed under guard and restricted to a room in the Visiting Officer's Quarters at Cannon Air Force Base. Both parties being dissatisfied with the disposition of the matter as it presently stands, this appeal followed.

At the outset we are faced with the familiar question of exhaustion of military remedies. Under well established military appellate procedure, appellant is entitled to obtain a review of his conviction by an Air Force Board of Review and, if a petition for review is granted, by the United States Court of Military Appeals. At the present time, the Board of Review has heard oral argument although no decision has yet been rendered. Thus, it is apparent that the military appellate procedures have not been pursued to finality.

It is well established, not only in this court[2] but by the United States Supreme Court[3] that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted. The policy underlying the requirement of exhaustion of state remedies applies with equal force to attacks upon the propriety of military confinement. Military law and state law both exist substantially independent and apart from the law governing the federal courts. All three separate judicial establishments necessarily reflect the effects of diverse functions. For this court to intervene in military matters prior to the full utilization of all means of rectification provided by that separate entity might well constitute

---

[2] *Noyd* v. *McNamara*, 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1082; *Gorko* v. *Commanding Officer*, 314 F. 2d 858 (10th Cir. 1963); *McKinney* v. *Finletter*, 205 F. 2d 761 (10th Cir. 1953); *Hunter* v. *Beets*, 180 F. 2d 101 (10th Cir. 1950), cert. den. 339 U. S. 963; and *McMahan* v. *Hunter*, 179 F. 2d 661 (10th Cir. 1950), cert. den. 339 U. S. 968. See Annot., 15 A. L. R. 2d 387 (1949).

[3] *Gusik* v. *Schilder*, 340 U. S. 128 (1950).

a needless interference with the procedures established to police the errors of that tribunal. Accordingly, if an available procedure has not been employed to permit the military to correct an alleged deficiency it is not for this court to undertake an untimely intervention.

Admittedly, appellant does not now attempt to collaterally attack the judgment of the court-martial on the merits. He seeks instead to obtain relief from his detention pending military appeal. Nonetheless, it is clear that this issue can be raised in the same manner on appeal to the proper military tribunal as if it related to any other failure to fully comply with the UCMJ.[4] Indeed, the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ in circumstances such as these.[5] Hence, it cannot be gainsaid that through a proper utilization of the review procedures established by the UCMJ appellant can raise the same issues presented here without going outside the system which initially, and at all times heretofore, has had the primary responsibility for his present confinement. As a result, available military review procedures remain to be utilized. We conclude, therefore, that appellant has failed to exhaust his military remedies.[6]

The order of the district court in granting partial relief is therefore vacated and the judgment is REVERSED.

---

[4] E.g., *United States* v. *Smith*, 2 CMR 817 (1952); *United States* v. *Ranes*, 3 CMR 550 (1952); *United States* v. *Lucero*, 18 CMR 942 (1955); and *United States* v. *Lock*, 36 CMR 72 (1965).

[5] *Levy* v. *Resor*, 37 CMR 399 (1967).

[6] This court in requiring that appellant first exhaust all available military remedies, does so after fully recognizing that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953).

## Order Granting Release

SUPREME COURT OF THE UNITED STATES

No. 830—October Term, 1968

Capt. Dale E. Noyd,

—v.—

Maj. Gen. Charles R. Bonds, Jr., *et al.*

Application for Release

(December 24, 1968)

Mr. Justice Douglas.

Petitioner, incarcerated as a result of a court martial, has filed a petition for writ of certiorari to the Tenth Circuit Court of Appeals denying him standing to challenge the place and manner of his incarceration[1] prior to final review of his conviction because he had not exhausted all of his military remedies. Unlike *Gusik* v. *Schilder*, 340 U. S. 128, this habeas corpus proceeding in the federal courts does not challenge purported error in a court martial trial prior to exhaustion of military reme-

[1] Art. 71(c) of the Uniform Code of Military Justice provides: "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

dies. Rather the question is whether the doctrine of exhaustion of military remedies applies where the question is whether the court martial authority acts outside its jurisdiction. Cf. *United States* v. *McElroy,* 258 F. 2d 927, 929, aff'd 361 U. S. 281. That question seems to be one of first impression.

The question seems to me to be a substantial one on which the full Court should pass, which it will not be able to do until January 10, 1969.[2] I therefore have concluded that until the Court is able to pass on the petition for writ of certiorari, petitioner should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from "assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter."

The precise terms and conditions may be settled by the District Court.

---

[2] My brother WHITE denied this application December 18, 1968; and I would therefore take this present application to the full Court were the members available. But since I feel that a substantial question is presented by the petition for writ of certiorari and since the problem raises a further issue, also unresolved, concerning the scope of review by the Court of Military Appeals and the role reserved for the regular federal courts, I feel that petitioner is entitled to relief pending consideration of the petition for certiorari January 10, 1969.

## Order Granting Writ of Certiorari

SUPREME COURT
OF THE UNITED STATES

January 20, 1969

"The petition for a writ of certiorari is granted and the case is placed on the summary calendar. The stay heretofore granted by Mr. Justice Douglas shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court."

## General Court-Martial Order No. 13

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS TWELFTH AIR FORCE (TAC)

Waco, Texas 76703

GENERAL COURT-MARTIAL ORDER 10 May 1968

NUMBER 13

Before a General Court-Martial which convened at Cannon Air Force Base, New Mexico, pursuant to Special Order C-2, Headquarters Twelfth Air Force (TAC), 17 January 1968, was arraigned and tried:

CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524th Tactical Fighter Squadron

CHARGE: Violation of the Uniform Code of Military Justice, Article 90

Specification: In that CAPTAIN DALE E. NOYD, United States Air Force, 524th Tactical Fighter Squadron, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, having received a lawful command from Colonel Homer K. Hansen, his superior officer, "To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled," did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same.

PLEAS: To the Charge and Specification: Not guilty

FINDINGS: Of the Specification and Charge: Guilty

SENTENCE: To be dismissed from the service, and to forfeit all pay and allowances, and to be confined at hard labor for one year. (No previous convictions considered.)

DATE ADJUDGED: The sentence was adjudged on 9 March 1968.

ACTION BY CONVENING AUTHORITY

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS TWELFTH AIR FORCE (TAC), Waco, Texas, 10 May 1968

In the foregoing case of CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524 Tactical Fighter Squadron, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after date of this action. The record of trial is forwarded to The Judge Advocate General of the United States Air Force for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

/s/ Charles R Bond Jr.
CHARLES R. BOND, JR., Maj. Gen, USAF
Commander

FOR THE COMMANDER

[SEAL]

EDWARD D SMITH, Lt Col, USAF
Director of Admin Services

**Letter Regarding Arrest in Quarters**

25 Jun 1968

Reply to attn of: CSC

Subject: Arrest in Quarters—Limitations on Your Activities

To: Captain Dale E. Noyd
Room 15, Building T–55
Cannon AFB, New Mexico 88101

1. Your place of arrest in quarters will continue to be Room 15, Building T–55, Cannon Air Force Base, New Mexico. However, the terms of your arrest are changed as follows to limit your activities:

a. You will be allowed to go to the dining hall only between 0700 and 0745 hours, and between 1145 and 1230 hours, and between 1700 and 1745 hours daily.

b. You will be allowed to visit the mail room only between 0700 and 0745 hours and between 1700 and 1745 hours daily.

c. You will be allowed to visit the Base Exchange only between 1000 and 1030 hours each Tuesday.

d. You will be allowed to visit the Base Laundry concessionaire only between the hours of 1030 and 1100 each Tuesday.

e. You will be allowed to visit the Base Library only between the hours of 1800 and 1900 each Thursday.

f. You will be allowed to visit the Base Barber Shop only between the hours of 0800 and 0900 each Tuesday.

g. You may visit the Base Gym for exercise between 0900 and 1030 hours on Friday provided you are accompanied by Captain Bruce H. Anderson or Captain (Dr.) Gregory R. Bonomo, and you will associate with no other person during these periods.

h. You will be allowed to visit the Chapel only once on Sunday.

In case any of the facilities listed in b through g are to be closed at these enumerated times because of a holiday or inventory, etc., you may substitute the preceding day.

You will not be escorted on these trips, however, you will take only the time necessary to accomplish these trips and return immediately to your quarters, but in no event will you take more time than the times enumerated above. Upon leaving and returning to your quarters for any reason you will notify Security Police Operations. In case of inclement weather or some other reason you need motor transportation on any of these trips, the Security Police will provide such transportation. You will wear the appropriate uniform at all times when you are not in your quarters. You will not leave your quarters for any other reason without permission of the Base Commander, except as follows: You may leave your quarters to visit the Base Hospital without prior notification to anyone at any time you have a medical or dental emergency. In case you need medical or dental attention not amounting to an emergency, you will notify Security Police Operations and then proceed to the hospital.

2. You will be authorized to have TV cable, a telephone and maid service in your room at your own expense.

3. Your quarters will be off limits to all personnel with the following exceptions:

a. You may have any defense counsel visit you at any time.

b. Members of your family may visit you two times a week for a period of two hours per visit on Wednesdays between 1400 and 1600 hours and on Sundays between 1400 and 1600 hours.

c. You may have other friends visit you once a week for a period of one hour on Thursdays between 1500 and 1600 hours. Any other persons wishing to visit you must have prior permission of the Base Commander.

4. You will acknowledge receipt of this communication by indorsement hereon and indicate therein your complete understanding of the same.

GEORGE R. DOERR,
*Colonel, USAF, Commander.*

Receipt acknowledged and contents understood.

/s/ Dale E. Noyd,
DALE E. NOYD,
*Captain, USAF.*

Date: 28 Jun 68

**Opinion of the Air Force Board of Review**

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

---

In the Board of Review, United States Air Force

Before

WILSON, *Chairman*, BOUCHER and TORVESTAD, *Members*

*Judge Advocates*

---

AFJAMA-2 ACM 20121

---

UNITED STATES

—v.—

Captain DALE E. NOYD, FR28084,
524th Tactical Fighter Squadron

---

3 September 1968

TWELFTH AIR FORCE (TAC)

Sentence adjudged 9 March 1968 by GCM convened at Cannon Air Force Base, New Mexico. Approved sentence: Dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year.

Appearances:

Mr. Marvin M. Karpatkin and Mr. John deJ. Pemberton, Jr., New York, New York, Colonel Dwight R. Rowland, Colonel Joseph E. Krysakowski and Lieutenant Colonel Leonard Eichner, appellate counsel for the accused;

Colonel James R. Thorn and Major Robert L. Bates, appellate counsel for the United States.

Tried by a general court-martial convened at Cannon Air Force Base, New Mexico, the accused was found guilty of willfully disobeying the lawful command of his superior officer, in violation of Article 90 of the Uniform Code of Military Justice. He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for one year. The convening authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement pending completion of appellate review.[1]

The specification of which accused stands convicted is as follows:

> "In that [accused] . . . having received a lawful command from Colonel Homer K. Hansen, his superior officer, 'To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled,' did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same."[2]

---

[1] The designation of the United States Disciplinary Barracks as the place of confinement pending completion of appellate review is under collateral attack (Noyd v. Bond, Civil No. 7560, —— F. Supp. ——, decided 24 May 1968 (DC NMex 1968), appeal and cross-appeal pending).

[2] Although the order was one to be obeyed *in futuro*, the evidence establishes that accused stated that he would not obey it and he carried out his intention (MCM, 1951, para. 169*b*; CM 349288, Cunningham, 2 CMR 466).

The principal defense advanced by the accused is that the Secretary of the Air Force made an error of law in disapproving the accused's two applications under Air Force Regulation 35-24, DISPOSITION OF CONSCIENTIOUS OBJECTORS, for classification as a conscientious objector and either separation or reassignment as a conscientious objector.

The facts are uncontested. In brief, the accused participated in the Air Force ROTC program at Washington State University for four years and in 1955 graduated as a distinguished military graduate. He then accepted a regular Air Force commission and has been on continuous active duty since that time. He received pilot training and is presently a senior pilot. At the expense of the Air Force he was a graduate student at the University of Michigan for three years and received a masters degree. He also completed the academic study necessary for a Ph.D degree. In return for the Air Force financing his graduate study, he committed himself to serve until June 1969.

In 1966, while a member of the faculty of the Air Force Academy, the accused developed a belief in ethical or religious "humanism", and decided that the conflict in Vietnam is unjust and immoral. He determined to refuse to fight in that conflict, if ordered to do so, but that he would accept assignments to duty consistent with his conscience. He subsequently tendered his resignation under the provisions of AFR 36-12, ADMINISTRATIVE SEPARATION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OF THE AIR FORCE. The Secretary of the Air Force refused to accept the resignation. The accused then submitted the first of two applications under AFR 35-24 for classification as a conscientious objector and either separation or reassignment as a conscientious objector. This application was disapproved by the Secretary of the Air Force.

The accused thereupon commenced an action in a Federal district court seeking declaratory relief, an injunction, and writs of habeas corpus and mandamus. The accused asked for substantially the same relief which had been denied him in his application under AFR 35-24. The district court ordered the action dismissed for lack of jurisdiction (Noyd v. McNamara, 267 F Supp 701 (DC Colo 1967), affd 378 F2d 538 (10th Cir 1967), cert. den. 389 US 1022, 19 L Ed 2d 667, 88 Sup Ct 593).

After the adverse decision in the district court, the accused, who had theretofore been transferred to Cannon Air Force Base, New Mexico, filed his second application under AFR 35-24. In August, 1967, the Secretary likewise disapproved this application.

The circumstances surrounding the offense of which accused stands convicted are concisely set forth in a statement, admitted in evidence as a defense exhibit, of the superior officer named in the specification. It accurately summarizes his sworn testimony at the trial:

> "After I had given Captain Noyd a direct order at 1115 hours, 4 December 67, to fly as scheduled, I released him to return to the squadron. Upon return the Commander of the 524TFS, Lt Colonel James L Glessner, excused him, at his request, to take care of personal matters to wit; visit the legal office. As a consequence, I requested he be informed of the flight schedule of 5 December which ordered him to fly as instructor in an F-100F with a student. Further, I requested he return to see me at 1545 on 4 December at which time I stated:
>
> 'I understand your squadron commander approved your request at noon for time to take care of personal

matters. This occurred after I had given you a direct order to comply with the flight schedule which assigned you to a training flight in an F-100F with 2nd Lt Matthew A Husson with takeoff at 1310.

'As a consequence, I am giving you a direct order to perform duties as instructor pilot tomorrow, 5 December, as scheduled. As I stated previously, I am aware of your conscientious beliefs with regard to performing duties as an instructor pilot, your application to be classified as a conscientious objector which has been denied and that you have taken this matter up with the federal courts and that you are awaiting a decision by the Supreme Court of the United States.

'Until such time the federal courts render a decision favorable to you, you are still required to perform proper military duties assigned to you and obey all lawful orders given to you and that your failure to do so can conceivably result in trial by General Courts-Martial. I am not desirous in resorting to such course of action, and therefore, I am giving you a direct order to perform duties as instructor pilot as scheduled. I have nothing further to add.'

"Captain Noyd stated that after he had declined to fly he thought it was clear to everyone that he was not following orders. Further he stated that he fully understood what I had stated and asked if there was anything more, saluted, and left."

The accused testified that he "knew in advance" that he could not obey the order; that at the time he was not suffering from any mental disease, or derangement of a nature

that could have prevented him from knowing the difference between right and wrong and adhering to the right; and that the violation of the order was a conscious, voluntary choice on his part. He also testified that, "In a sense I would say I had no choice, because I felt that it was what I must do".

After the trial, individual defense counsel assigned 18 errors and presented oral argument to the Staff Judge Advocate. The allegations of error were extensively discussed in the competent and scholarly review of the Staff Judge Advocate and resolved adversely to the accused. Appellate defense counsel have assigned 19 errors, 18 of which are identical with those assigned and argued below and resolved in the review. We agree with the Staff Judge Advocate's disposition of these allegations and adopt his conclusions, with the further discussion set forth hereinafter. As to the remaining assigned error submitted by appellate defense counsel, we find that it is entirely without merit and requires no discussion.

Our decision in ACM 20016, Dunn, —— CMR ——, decided 1 May 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn,* the defense likewise demanded a judicial review within the court-martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:

> "The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause

14, of the Constitution 'To make Rules for the Government and Regulation of the land and naval Forces' (Reid v. Covert, 354 US 1, 1 L Ed 2d 1148, 77 Sup Ct 1222). In its exercise of this power, the Congress did not include in the Uniform Code of Military Justice a grant of jurisdiction to military tribunals to review such administrative determinations.

"Voluntarily enlisted servicemen are a distinct class from inducted civilians. Military regulations providing a procedure for voluntarily enlisted servicemen to request discharge on the ground of conscientious objection reached after enlistment do not deny procedural due process or equal protection under the Constitution. And it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process (Brown v. McNamara, 387 F 2d 150 (3rd Cir 1967) [cert. den. sub nom. Brown v. Clifford, 390 US 1005, 20 L Ed 2d 105, 88 Sup Ct 1244])." (*Dunn*, supra, at p. ——).

It is not within our province to suggest at what stage a question of substantive due process in proceedings under AFR 35-24 may be ripe for adjudication in the Federal courts. In this connection, we observe that in *Noyd*, supra, the Court of Appeals, in affirming the order of the district court dismissing the action for lack of jurisdiction, held that:

"The *essence* of appellant's claim is that the Federal judiciary should review and determine the validity of military assignments to duty. This we cannot do." (378 F 2d, at p. 540). (Emphasis added).

We also observe that in a recent military habeas corpus case involving a conscientious objector claim, Hammond v. Lenfest, No. 31909, —— F 2d —— (2d Cir), decided 10 June 1968, the court stated:

> "Principal reliance is placed [by the Government] upon the recent decision in Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), aff'd, 378 F. 2d 538 (10th Cir.), cert. denied, 389 U.S. 1022 (1967), in which the District Court refused to examine the conscientious objector claim of an Air Force captain with 11 years' service who was not a 'total pacifist' but was merely opposed 'to the war that this country is waging in Vietnam.'" 267 F. Supp. at 703-04. It is possible to read Noyd as nothing more startling than an application of the settled doctrine that the federal courts will not interfere with duty assignments of persons lawfully in the armed forces, Orloff v. Willoughby, 345 U.S. 83 (1953). See Crane v. Hedrick, —— F. Supp. ——, —— (N.D. Cal. 1968). To the extent that Noyd might suggest that a court martial is a prerequisite for federal court review of the claim that the petitioner, at the time of bringing suit, is not lawfully in the armed forces, we reject its reasoning. For several sufficient reasons we hold that Hammond's claim is now ripe for adjudication.
>
> . . . . .
>
> "Furthermore, Hammond contends—and the government does not assure us otherwise—that a court martial would consider itself bound by the determination of the Chief of Naval Personnel and would not entertain a challenge to the denial of Hammond's request. See Brown v. McNamara, 387 F. 2d 150, 153 n. 5

(3d Cir. 1967), cert. denied, —— U.S. —— (1968) (noting, but not ruling upon, the instant contention). And, we are referred to no case that suggests that presenting a conscientious objector claim as a defense to a charge of violating military law by failing to obey orders would be anything more than a futile and ritualistic gesture. The law knows of no such requirement."

As to the claim that the law officer erred in refusing the defense's requested instructions involving the proposition that accused's beliefs could have rendered him mentally incapable of intentionally defying authority, the record clearly establishes that the accused, the same as Cupp (ACM 13462, Cupp, 24 CMR 565, 572), made a self-determined, voluntary, and intentional choice as to which military orders and duties he would accept or reject. *Dunn* likewise governs this issue. The relevant language in *Dunn* follows:

"It is well established that a self-determined conscientious objection is not a defense to the willful disobedience of military orders. As recently held by an Army Board of Review in a similar case involving a self-determined conscientious objector:

"'We reduce the applicable military law, as we see it, to one simple statement,

'Personal scruples or qualms, whether based upon religious conviction, personal philosophy or other, are no defense to military offenses. (Subpara 169b, MCM, US, 1951; ACM 9036, Morgan, 17 CMR 584; ACM 13462, Cupp, 24 CMR 565).' (CM 413709, Taylor, 37 CMR 547, 552).'" (Dunn, supra, at p. ——).

Moreover, the record discloses that the instructions given by the law officer in this respect exceeded the requirements of the law, and in fact are substantially in accord with the defense's requested instructions. Having received a gratuity, the accused can not now be heard to complain.

The remaining assigned error for our discussion is that the law officer erred in denying the accused's challenge to the array for cause and the motion for mistrial based thereon.

After an extensive voir dire of the 10 court members, individual defense counsel made a motion either to dismiss the entire panel or to grant a mistrial. He pointed out that the examination revealed that all 10 members of the court, except one, had either served in Southeast Asia, or were involved in the training of personnel for service in that area. He argued that this circumstance alone was sufficient *as a matter of law* to establish that the members could not be fair and unbiased.

The law officer ruled that the motion was, in effect, a challenge for cause against the entire panel. In overruling the motion, the law officer advised that the ruling did not preclude the defense from challenging individual members and having such challenges determined by the other members. Defense counsel stated that he was not making any challenges for cause as it would be futile. He challenged one member peremptorily.[3]

Appellate defense counsel have submitted to the Board of Review a roster of all field grade officers (except chap-

---

[3] Appellate defense counsel criticize the procedure for challenges for cause prescribed in Articles 41, 51, and 52 of the Code. In this regard, we need say no more than that the United States Court of Military Appeals, in sustaining the present procedure, has recommended amendatory legislation (U.S. v. Cleveland, 15 USCMA 213, 35 CMR 185).

lains) assigned to the 12th Air Force as of the date of the appointing order.[4] According to the roster, at that time there were 1623 so assigned. Of that number, 550, or 34%, had their last tours of duty in Southeast Asia.

Counsel argue that since only 34% of the officers assigned to the 12th Air Force had their last tours of duty in Southeast Asia, the fact that 80% of the panel in this case consisted of recent Southeast Asia returnees gives the appearance of a hand-picked panel. They present this novel argument in their brief:

> "Among the members of the array were officers who had flown one hundred and more combat missions in Southeast Asia. Many of them undoubtedly had friends who were shot down. It is common knowledge that every Air Force man who flies in combat has great concern for the safety of his 'wing man', and expects his wing man to have similar concern for him. Added to the combat experience is the ingrained attitude of obedience to all orders without question . . . . When a career officer, a fighter pilot, accused of disobeying an order to train a pilot for combat in Vietnam, is put on trial before a General Court, it would require more than normal human efforts to overcome possible bias, even for a single court member. But where 4/5th of the court are all subject to these same conditioning factors, it is simply impossible to have a fair trial."

Understandably, the defense cites no authority, and our research has found none, which suggests that combat ser-

---

[4] Submission of roster made on motion granted by the Board of Review in the exercise of its discretionary authority (Rule 18e, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, 37 CMR xv, xx).

vice as a member of the armed forces of the United States can result in disqualification *as a matter of law* to serve as a member of a court-martial.

Obviously, it could not be seriously contended that those who have served honorably on the field of battle are disqualified *as a matter of law,* individually or collectively, to serve as members of a court-martial in trials involving heinous offenses, such as mutiny or sedition (Article 94), cowardly conduct in the presence of the enemy (Article 99), or aiding the enemy (Article 104). *A fortiori,* a combat background cannot be considered disqualifying as a matter of law in trials involving any offenses of lesser gravity.

The record discloses no impropriety in the selection of the members of the court. They were not "minions of law enforcement agencies" (U.S. v. Hedges, 11 USCMA 642, 29 CMR 458, concurring opinion by Judge Latimer). There is no appearance of a court hand-picked to favor the prosecution. We conclude that the convening authority appointed as members of the court only such persons as, in his opinion, were "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament" (UCMJ, Art. 25(d)(2); MCM, 1951, para. 4*d*). There is no evidence to the contrary.

The record of trial clearly establishes there was no bias on the part of any court member. All members expressed their willingness to try the case on the evidence and to follow the instructions on the law given by the law officer.

An accused is not entitled to favorable court members or any particular kind of juror (U.S. v. Sutton, 15 USCMA 531, 36 CMR 29). He has no right to jurors who believe him innocent; however, he does have an unqualified right to jurors whose minds are uncommitted (U.S. v. Deain, 5 USCMA 44, 17 CMR 44). We are fully satisfied the accused

was afforded that right and that the law officer properly denied the motion for a mistrial (U.S. v. Waldron, 15 USCMA 628, 36 CMR 126).

In addition, the fairness and impartiality of the court members is demonstrated by the fact that, notwithstanding the seriousness of the offense, they adjudged a lenient sentence.

In evaluating the appropriateness of the sentence, we have thoroughly considered all the factors and surrounding circumstances in the record. We conclude that the approved sentence is appropriate and should be affirmed.

Article 66(c) having been complied with, the findings of guilty and the sentence are

AFFIRMED.

CHESTER W. WILSON
ERNEST BOUCHER
ROBERT J. TORVESTAD

## Opinion of the District Court, District of Colorado, Dated March 29, 1967

*Noyd* v. *McNamara, et al.*

WILLIAM E. DOYLE, *U.S.D.J.*:

This is an action in which the plaintiff, in a lengthy complaint in which he names the Secretary of Defense, Secretary of the Air Force, Chief of Staff of the Air Force, Superintendent of the Air Force Academy and other officials, seeks declaratory relief and applies for habeas corpus, seeks injunctive relief and, at the moment seeks a preliminary injunction.

The factual basis for this is that plaintiff has declared himself to be a conscientious objector and, notwithstanding that fact, the Air Force proposes to transfer him to Cannon Air Force Base, New Mexico, as of April 1, 1967. The allegation is that this is a training base, or jumping-off base for Vietnam, and that he will be compelled, contrary to his beliefs, to at least train fliers who are going to Vietnam, and he says that this is work that is contrary to his conscientious scruples.

It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and that it is clear from the record as applied to the statute involved, 50 U. S. C. §456(j), that he is not opposed to war in any form. A definition contained in the statute is called to the Court's attention, and although it is set up in a somewhat left-handed way, it suggests this interpretation. However, an examination of the cases does not bear this out because the Supreme Court has given a broad interpretation to the term, particularly the Seeger case which was cited to me, *United States* v. *Seeger,* 380 U. S. 163, 88 S. Ct. 850 (1965). Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views. Moreover, a similar judicial viewpoint, attitude, or approach is made in *Sicurella* v. *United States,* 348 U. S. 404, 75 S. Ct. 403 (1965), so that I must conclude from reading these cases that the complaint is not entirely without substance and that it does demand that the case be given further study.

It has also been strongly urged by the defendants that we do not have jurisdiction to hear and determine the matter. Yet, an almost identical motion was considered by the Court of Appeals for the District of Columbia in the case of *Gallagher* v. *Quinn,* 363 F. 2d 301, in an opinion by Judge Fahy, which specifically recognizes that there is jurisdiction over the subject matter in a factual context similar to this one. So I do feel that it is a case in which a full hearing should be had, either now or later. Indeed, it is going to have to be had, and if this Court were to dismiss this complaint upon the basis of the brief hearing that was had here today, I think that it almost certainly

would be referred back for a hearing in depth on its merits. So, without determining definitely that the cause is one that is meritorious, without intending to establish any precedent for this type of case, it is this Court's conclusion that there is enough merit expressed and there is probable jurisdiction shown justifying the granting of some kind of relief, with a view to taking a closer look at it in an unhurried atmosphere and after both sides have had an opportunity to prepare themselves.

I note that this case was filed on Monday. I have had no opportunity to read the complaint. We heard it this morning. I have been tied up all afternoon and have not had an opportunity to study it. The views expressed are not studied, but they are viewpoints I have arrived at from hearing counsel and from the limited amount of study I have given it. I do feel that this requires a full hearing and this is why I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter. I do not wish to interfere with the power of the Air Force to move him from one place to another; in other words, I do not wish to exercise any more power than is necessary under the circumstances and, accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly. The Court does hold that it retains jurisdiction of the controversy and it is suggested that we try the case on the merits in about three weeks from today, Wednesday, April 19, commencing at 9:30 o'clock a.m.

I would ask counsel to prepare an order consistent with the statements made here.